SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 795

GLOBE INDEMNITY COMPANY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Globe Indemnity Company, a corporation, prays that a writ of certiorari to review the judgment of the Court of Claims of the United States in the above entitled cause be granted.

Jurisdiction

The judgment of the Court of Claims of the United States was entered May 1, 1944. A motion for a new trial was overruled on October 2, 1944 (R. 36). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement

Peter & A. J. Ellis, Inc., a corporation, entered into a contract with the respondent May 12, 1933 for the construction of the West Extension of the Steam Distribution System of the Central Heating Plant for Public Buildings in Washington, D. C., which system consisted of three distribution lines running in certain streets in the City of Washington, seventy-five (75%) percent of which was in close proximity to sewer, gas, water and electric mains, and either adjacent to or under paved streets and sidewalks. (Fdgs. 2 and 5.)

Except as to certain places where the drawings and specifications showed sheet steel piling was required, the drawings and specifications indicated that the soil conditions were such that the temporary planking timber sheeting and other supports were to be removed after the backfill had been placed. (Fdg. 7.)

In accordance with Articles 104 and 110 the contractor planned to use temporary planking, timbering and sheeting as the trench work progressed. (Fdg. 9.) After the work commenced it was discovered that the soil was soft flowing silt, and where this condition existed it was impossible to remove the temporary timber sheeting and shoring. (Fdg. 10.)

This condition was brought by the contractor to the attention of the government engineers, whereupon the contractor was told to complete the work and see how much lumber had to be left in place and then make up a proposal for the added cost thereof, which procedure was followed, and thereafter a written proposal in the sum of $19,565.00 was presented by the contractor for the timber sheeting left in place, which proposal was submitted by the construction engineer to the Supervising Architect of the Treasury Department recommending that it be accepted. (Fdg. 11.)

Thereafter, on January 2, 1934, a revised proposal in the sum of $19,439.25 was submitted by the contractor, which in turn was transmitted by the construction engineer to the Public Works Branch, Procurement Division of the Treasury Department, with a statement that it represented a fair and reasonable claim and that it be favorably considered. (Fdg. 13.)

On May 2, 1934 the Director of Procurement notified the contractor in part as follows:

> "A thorough review of the data in this case indicates that the extra you are claiming is not *legally* allowable and your proposal above described is therefore rejected. While the review of the case indicates, as stated above, that there is no tenable *legal* ground for the claim, if you still believe that it presents equitable considerations in your favor, *you have a right to present the claim direct to the Comptroller General.*" (Italics supplied.) (Fdg. 14.)

Thereafter the contractor submitted its claim for consideration to the General Accounting Office, and on February 27, 1936, L. A. Simon, as Assistant Director of Procurement, made a report to the General Accounting Office, in part, as follows:

> "In summary, it is concluded that there was no requirement in the contract which provided the methods to be followed under the unexpected conditions actually encountered. On the other hand, paragraph 110 of the specification specifically required that temporary sheeting be removed. A change in the requirements was plainly necessary if the temporary sheeting was to be left in the trenches.
>
> "Whether the change was one to be made under Article 3 or under Article 4 of the contract depends upon whether the nature of the soil to be expected was 'indicated' in paragraph 110 of the specification, since it is clear that the drawings contained no representations in that regard. It is believed that paragraph

110 did clearly indicate a form type of soil which would permit the removal of temporary sheeting. In fact, the direction to withdraw the temporary sheeting was more definite than a report on soil conditions; for if soil data alone had been furnished, each bidder would have been required to determine for himself whether removal of the sheeting would be possible. But if the nature of the soil was not 'indicated' within the meaning of Article 4, it nevertheless remains that a change in the contract requirements was necessary, and to effect the change resort to Article 3 of the contract would have been appropriate.

* * * * * * *

"Attention is invited to the fact that the claim states in several places that temporary sheeting was left in the trenches for the support of adjacent buildings. The Construction Engineer, now the Supervising Engineer, has stated that no temporary sheeting was in fact left in the trenches for this purpose, since adjacent buildings generally rested on piles and did not need support. Thus, the claim may be considered without reference to the possibility that the government was entitled to a credit for failure to install sheet steel piling at such points in accordance with paragraph 104 of the specification.

* * * * * * *

"The serious legal objection to the claim arises by reason of the fact that the contractor was not ordered to leave the temporary sheeting in the trenches under either Article 3 or Article 4 of the contract. It may be asserted, however, that an order would have been given had an attempt been made to remove it, and the contractor's procedure was the only feasible solution of an unavoidable problem. The Construction Engineer was fully cognizant of such procedure, as was this office, and there was no intimation during the time when the work was being performed that payment would not be made in accordance with the proposals under consideration. The work was necessary, and the proposal of

July 17, 1933, slightly revised, would have been accepted in advance of the work but for doubts then entertained as to the scope of the contract requirement. The government has received the full value of the sheeting left in the trenches, and, since the claim has been carefully checked and is believed to be reasonable in amount, it is recommended for such equitable consideration as the Comptroller General may give it."

Thereafter the General Accounting Office denied the contractor's claim. (Fdg. 17.)

The petitioner, as surety upon the contractor's bond, given to secure the performance of the contract, was compelled to accept liability and pay creditors, resulting in a net loss to the petitioner of $19,204.56, and petitioner, by virtue of its rights of subrogation, brought suit in the Court of Claims for the amount claimed to be due the contractor for the extra work. The Court entered judgment for the respondent.

Three Judges of the Court, including Chief Justice Booth (retired), held that under Article 3 of the contract, which provides that no change involving an estimated increase or decrease of more than $500.00 shall be ordered (by the contracting officer) unless approved in writing by the head of the Department, or his duly authorized representative and, no such written authority having been given by the head of the Department, petitioner was not entitled to recover (R. 34).

Two of the Judges, while disagreeing with the majority, held that as the contractor had not appealed to the head of the Department, in accordance with Article 15 of the contract, the plaintiff was not entitled to recover (R. 36).

Questions Presented

1. Whether under Articles 3 and 4 of a standard form Government contract, which provide for changes and

changed conditions, a contractor is precluded from recovering for extra work of the value of more than $500.00, because it had not been approved in writing by the head of the department.

2. Whether under Article 15 of a standard form Government contract, which provides for the settlement of disputes and appeal to the head of the department, a contractor is precluded from recovering for extra work, unless he appealed to the head of the department, where the rejection of the claim is based on legal grounds and the contractor is referred direct to the Comptroller General.

Contract and Specification Provisions Involved

The contract and specification provisions involved are set forth in the Appendix, *infra*, pp. 32-33.

Reasons for Granting the Writ

1. The Court of Claims has decided an important question of law relative to the construction of a standard form of Government contract which, if followed, will preclude recovery in practically every contract case where the amount involved is in excess of five hundred dollars.

2. The decision of the Court of Claims is really an evenly divided decision between the actual members of that Court and in conflict and inconsistent with its own decision in the case of *Armstrong* v. *United States*, 98 Ct. Cls. 519 (1943), therefore establishing great confusion, and the question should be authoritatively settled by this Court.

3. The decision of the Court of Claims fails to recognize the right of a contractor to recover upon a Quantum Meruit, which right has long been recognized by this Court.

4. The minority opinion is contrary to long established decisions of the Court of Claims that the right of the con-

tracting officer to decide questions of fact, does not include questions of law and, further, is in conflict and inconsistent with its decisions in *Rust Engineering Co.* v. *United States*, 86 Ct. Cls. 461 and *Thomas Earle & Sons, Inc.* v. *United States*, 100 Ct. Cls. 494, and should be authoritatively settled by this Court.

Prayer for Writ

Wherefore, the premises considered, your petitioner respectfully prays for the allowance of a Writ of Certiorari to the Court of Claims of the United States in this cause in order that it may be reviewed and redetermined by this Honorable Court.

Respectfully submitted,

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 795

GLOBE INDEMNITY COMPANY, A CORPORATION,
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THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below

The opinions of the Court of Claims of the United States, found in the record at pp. 31 and 35, are not yet officially reported.

Statement

A statement of the case has been set forth in the Petition for Writ of Certiorari and, in the interest of brevity, the statement is not repeated at this point.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that a contractor cannot recover for extra work, of the value of more than five hundred dollars, unless

the extra work has been approved in writing by the head of the department.

2. In holding that the petitioner could not recover for extra work because the contractor did not appeal to the head of the department from the decision of the contracting officer.

Argument

1

THE COURT OF CLAIMS ERRED IN HOLDING THAT A CONTRACTOR CANNOT RECOVER FOR EXTRA WORK, OF THE VALUE OF MORE THAN FIVE HUNDRED DOLLARS, UNLESS THE EXTRA WORK HAS BEEN APPROVED IN WRITING BY THE HEAD OF THE DEPARTMENT.

A

It can hardly be questioned that in most of the suits filed against the United States in the Court of Claims, involving contracts, there is a dispute between the contractor and the United States as to whether or not the contractor is entitled to extra compensation for work performed outside the contract requirements. It is unnecessary to point out that the head of the department is certainly not going to give written approval for extra work when he is taking the position that the work is not extra and is covered by the contract. To hold that a contractor cannot recover for extra work of the value of more than five hundred dollars, unless the extra work is approved in writing by the head of the department, notwithstanding the work was necessary, has been performed, and the Government obtained the benefit thereof, would preclude recovery in practically every contract case where there is a dispute between the contractor and the head of the department.

The Court of Claims has on numerous occasions given judgment for a contractor for amounts in excess of five

hundred dollars, where the work was not approved in writing by the head of the department. The following are but a few examples:

In the case of *Sollett & Sons Co.* v. *United States*, 80 Ct. Cls. 798, a dispute arose concerning the kind of title to be installed. Upon the insistence of the contracting officer the contractor installed glazed tile at an additional cost of many thousands of dollars. The Court of Claims decided that the contracting officer was in error and that the contractor was entitled to be paid the additional cost of installing glazed tile and, in the course of its opinion, stated in part as follows:

> "The defense is made that no change order was demanded by or issued to the contractor as required by the terms of the contract when changes were made. The inconsistency of this defense is apparent. The contracting officer and his superiors rule the contract provided for the glazed tiles. The contractor was ordered to furnish and erect the glazed tiles under the terms of the contract. A futile act is not required by the contractor. The plaintiff consistently has preserved his rights. The requirement by the defendant for glazed tiles was outside the terms of the contract. The plaintiff is entitled to recover the additional cost to it of furnishing and erecting the glazed tiles instead of the vitrified tiles."

It will be seen from the foregoing case that even though there was no written order the Court gave judgment for the contractor.

In the case of *United States* v. *McShain*, 308 U. S. 512, which was a *per curiam* decision reversing part of the decision of the Court of Claims (88 Ct. Cls. 284), an examination of the decision of the Court of Claims discloses the contract involved was with the Treasury Department, as was the contract in the instant case, and was for clearing

the site and construction of foundations for the Annex to the Internal Revenue Building, in this city.

While the suit contained several claims the only one having any relation to the instant case was an extra of $1350.00 for removing concrete.

The contract contained articles the same as articles 3 and 4 in the instant case, which provided that no change involving an increase in excess of $500.00 shall be ordered unless approved in writing by the head of the department, and that the contracting officer may, with the written approval of the head of the department, make changes in the drawings and specifications.

The contract also provided that the contractor should fully inform itself as to the location of site and conditions under which the work was to be done, and also examine the premises and inform itself of its character and type of structures to be removed. The contractor made an examination of the site and found it consisted in part of an automobile parking lot covered with cinders. There was nothing to indicate that a building had once occupied the site, nor that beneath the cinders the Contractor would encounter a concrete foundation. When the excavation reached the vacant lot it was discovered for the first time that there was a concrete foundation beneath the cinders. The contracting officer ordered the contractor to remove the concrete and approved $1,350.00 as the additional cost thereof, but the General Accounting Office ruled that the Government was not liable for the increased cost and refused to pay the claim.

There is nothing in the record to show that the head of the department ever approved in writing (or otherwise) the increased cost as required by article 3, and we have been informed by counsel for the plaintiff that he did not do so. Notwithstanding this complete failure to comply

with the provisions of articles 3 and 4, the Court of Claims gave judgment for an amount in excess of five hundred dollars and this Court did not reverse that part of the Court of Claims decision.

In the case of *Griffiths* v. *United States,* 77 Ct. Cls. 542, the Court of Claims permitted a recovery for extra work for which there had not been a written order by the contracting officer, although the contract provided that no charge for extra work or material would be allowed unless the same had been ordered in writing by the contracting officer and the price stated in such order.

In the case of *Ruff* v. *United States,* 96 Ct. Cls. 148, which involved a contract to construct a Post Office Building at Reading, Penna., one of the contractor's claims was for extra work in the sum of $3,326.62 for rock excavation. The Government furnished a drawing which showed a test pit and the nature of the samples therefrom. The samples did not show any rock. The contractor encountered rock in excavating for the footings and notified the Procurement Division and asked for additional compensation for the cost of the rock excavating, which was refused. The contractor appealed to the Secretary of the Treasury, and the Administrator of Federal Works denied the appeal. The Court of Claims permitted recovery under Article 4 of the contract, although the work had not been approved in writing by the head of the department, and stated in part as follows:

> "We think, therefore, that the subsurface condition was an unforeseen one, within the meaning of Article 4 of the contract, and that plaintiff was entitled to an adjustment of price and, not having received it, he is here entitled to compensation for the unexpected work. If this situation is not within the contemplation of Article 4, the alternative is that bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered. Such

a practice would be very costly to the defendant. We suppose that the whole purpose of inserting Article 4 in the defendant's contracts was to induce bidders not to do that."

With reference to Article 15, the Court said:

"As to the third item of dispute, that about the rock unexpectedly encountered in the course of excavation, the real question is whether, in view of the information furnished plaintiff by the defendant with reference to soil conditions on the site and in the neighborhood, the rock was an unanticipated subsurface or latent condition within the meaning of Article 4 of the contract. As to that, there is no evidence that anyone who took part in the negotiation of the contract, either on the side of the defendant or plaintiff, anticipated the condition that was actually encountered. That being so, the decisions of the defendant's officials were lacking any substantial support in the evidence. If the case were being tried by a jury, and the evidence stood as it does here, the Court would direct a verdict. We do not believe the plaintiff, in agreeing to Article 4 of the contract, intended to submit his rights under the contract to the hazard of a decision, not having any substantial evidence to support it. We think, therefore, that Article 15 does not prevent us from deciding this question also on its merits."

In the instant case the report of Mr. Simon states:

"Whether the change was one to be made under Article 3 or under Article 4 of the contract depends upon whether the nature of the soil to be expected was 'indicated' in paragraph 110 of the specifications, since it is clear that the drawings contained no representations in that regard. It is believed that paragraph 110 did clearly indicate a form of type of soil which would permit the removal of temporary sheeting. In fact, the direction to withdraw the temporary sheet-

ing was more definite than a report on soil conditions; for if soil data alone had been furnished, each bidder would have been required to determine for himself whether removal of sheeting would be possible. But if the nature of the soil was not 'indicated' within the meaning of Article 4, it nevertheless remains that a change in the contract requirements was necessary, and to effect the change resort to Article 3 of the contract would have been appropriate."

In the instant case we have a situation almost identical with that in the *Ruff* case as to unforseen subsurface conditions, the only real difference being that in the *Ruff* case the Government officials, having charge of the contract, were taking the position that the data furnished the contractor pointed to the probability of rock, while in the instant case the Government officials having charge of the contract take the opposite position. On the decision of the *Ruff* case alone the Court of Claims should have given judgment for the petitioner.

There have been many other cases where the Court of Claims has allowed a recovery for extra work, although the request therefor was oral, nothwithstanding the fact that the contract provided the order must be in writing, and in some instances by the head of the department, among which are the following, which we shall discuss more in detail hereafter.

Davis v. *United States*, 82 Ct. Cls., 334.
Rust Engineering Co. v. *United States*, 86 Ct. Cls. 461.
Armstrong & Co. v. *United States*, 98 Ct. Cls. 519.

B

Article 3 Not Applicable

Article 3 provides in part as follows: "No change involving an *estimated* increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in

writing by the head of the department or his duly authorized representative" (Italics supplied). It is clear that said article contemplates a situation where it is possible to estimate in advance of the work the cost thereof. In the present case it was not possible to estimate in advance the cost of work. The contractor was told to complete the work and see how much lumber had to be left in place and then make up a proposal for the added cost of the same (Fdg. 11, R. 22).

C

Evenly Divided Decision

This case was originally argued on January 5, 1944 before Chief Justice Whaley and Associate Justices Whitaker, Littleton and Madden (R. 17); Associate Justice Jones being on leave of absence as Food Administrator. It was quite apparent during the argument that there was a decided difference of opinion between Chief Justice Whaley and Justice Whitaker on the one hand and Justices Littleton and Madden on the other hand, and this is confirmed by the fact that the Court, on March 22, 1944, remanded the case for re-argument on April 3, 1944 R. 17). The case was re-argued on April 5, 1944 (R. 17), at which time Chief Justice Booth (retired) sat in the place of Justice Jones (R. 17). As shown by the opinions (R. 31, 35) the Court was divided on the question as to whether or not the contractor was precluded from recovering because the work had not been approved in writing by the head of the department, Chief Justice Booth (retired) concurring with Chief Justice Whaley and Justice Whitaker (R. 35).

In a previous case, *Armstrong & Co.* v. *United States*, 98 Ct. Cls. 519 (1943), involving practically the same question, the Court of Claims was similarly divided, except that Associate Justice Jones participated in the case and concurred

with Justices Littleton and Madden, and judgment was rendered for the contractor. In the *Armstrong* case the contract provided that the contractor should use certain common brick to be furnished by the United States. The Constructing Quartermaster decided to use the common brick for another job and required the contractor to use other brick, which resulted in an increased cost to the contractor. Upon completion of the job the contractor submitted a claim for the cost of the additional labor and material, which was rejected. The government resisted the claim upon the ground that there had been no written order for the change. The Court of Claims, in deciding in favor of the contarctor, stated in part as follows:

> "Our question is, however, not what would have been correct practice when the extras were ordered, but what to do with a case in which the responsible representative of the Government has not done nor has the contractor insisted upon his doing what the contract enjoined him to do at that time; a case in which, moreover, the contractor has, pursuant to an oral rather than a written order, performed just what the Government wanted to be done, and the Government has taken the product of that performance but refuses to pay for it. If we say that the position of the Government is legally correct, we thereby refuse to remedy a grave injustice because of the omission of a formality, because the words of the contracting officer were spoken and not written and did not say what was then impossible to say."

* * * * * * *

> "There is not a word in the record to show that the order of the Constructing Quartermaster, by which he saved some hundreds of thousands of bricks of good quality and diverted them to a more economical use for the Government, was in fact given without consultation with and sanction of his superior officers in the depart-

ment. There is no evidence that the department was not pleased at and benefited by the result accomplished by the order. There is no evidence that the Constructing Quartermaster was disciplined or even reprimanded for having, in violation of the mandate of the defendant's standard contract, ordered this extra work, the consequence of which was, unless we give relief, to cheat this plaintiff out of a large amount of money, and involve the department in an act of repudiation which, if done by anyone other than a government, would be regarded as dishonorable, even if legally permissible.

"What we have said leads us to this conclusion: when the contracting officer orally directed plaintiff to use the steel plant bricks, and promised it that an adjustment would be made when the work was completed and the fair amount determined, and when that direction was performed by plaintiff by doing the work and using the required material, a contract to pay plaintiff the reasonable cost of the work resulted."

Thus we have a situation where, when this question again comes before the Court of Claims, the decision will depend upon whether Justice Jones has returned and, if not, upon the opinion of whatever Justice sits in his place. This, we believe, is a very important question, and in order to avoid confusion this Court should grant the petition for writ of certiorari.

D.

Plaintiff entitled to recover on Quantum Meruit.

The case of *Clark* v. *United States*, 95 U. S. 539, originated in the Court of Claims and was for the recovery of the value of a steamer and use thereof. An officer of the Army entered into an oral contract with claimant to rent his steamer for $150.00 a day and to run her on a trial trip and if lost on the trip the government to pay the estimated value thereof. The steamer was delivered to the Quartermaster Department and, while on the trial trip, was wrecked.

It was determined that the value of the steamer was $60,000. The Court of Claims denied recovery upon the grounds that the contract was not in writing as required by the Act of June 2, 1862. This Court, while agreeing with the Court of Claims that recovery could not be had for the value of the steamer, reversed the Court of Claims with respect to the rights of the claimant to recover for the use of the steamer while it was in the hands of the government agents and held that when a parole contract has been wholly or partially executed and performed on one side, the party performing will be entitled to recover the fair value of this property or services upon an implied contract for a *quantum meruit*, the Court saying:

> "Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parole contract."

Further, the Court said:

> "If objected that the petition contains no count upon an implied contract for quantum meruit, it may be answered that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived."

In the case of *W. B. Moses* v. *United States*, 61 Ct. Cls. 352, the plaintiff had furnished certain furniture to the Navy Department, but payment was refused by the Comptroller of the Treasury Department upon the grounds that there had been no compliance with Sec. 3744 R. S., requiring contracts to be in writing and not sufficient proof of value of the furniture. Prior to suit being filed a contract was